In the Supreme Court of the United States

OCTOBER TERM 1951

No. 648

BRADLEY MINING CO., A Corporation,
Petitioner,

vs.

EDWARD H. BOICE,
Respondent.

Reply Brief of Petitioner

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

In its petition, Petitioner has set out four questions that are presented. Respondent states that there are only two questions—by doing so, Respondent avoids the crucial question, i.e., whether a verdict rendered in a United States Court, when induced by passion and prejudice, shall stand.

Respondent's brief contains no discussion of the failure of the majority of the panel of the Circuit Court to make a direct finding that passion and prejudice did not enter into the rendering of the verdict by the jury.

DEPARTURE BY MAJORITY OPINION—NECESSITY OF SUPERVISORY REVIEW

Circuit Judge Pope's specific findings of the existence of appeals to passion and prejudice resulting in a grossly excessive verdict are contained in our original petition. His

detailed documentation of such inflammatory appeals is supplemented by record references in Appendix B of our petition. His findings, in brief, as to the record of inflammatory appeals are—

> "• • • they show a deliberate effort to inject, not by proof, but merely by innuendo, matters calculated to give rise to passion and prejudice on the part of the jury. • • • The important fact is that this highly prejudicial matter was improperly before a jury which has produced a very large verdict. It serves to account for the size of the verdict. • • • A jury cannot be expected to make a calm, judicious and fair appraisal of damages in such an atmosphere. It is apparent that this one did not." (R. 2219-2224)

The majority of the panel in its opinion does not dispute the fact that the findings made by Judge Pope in his dissent correctly state the record. We repeat the pertinent excerpt from the majority panel opinion which actually confirms Judge Pope's findings of the existence of appeals to passion and prejudice. The majority said—

> "The complaint is that the impeaching questions were not attempted to be followed up by evidence that the witness had in fact made the statement. One need not approve tactics of this sort in order to reject appellant's argument. We think that jurors are not so easily misled. They may safely be assumed to have intelligence enough to know that if a party has evidence tending to impeach an adverse witness he will produce it.[1] In sum, the instances of claimed miscon-

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[1]The short answer to this observation is that no such impeachment evidence was introduced—the "impeachment" was constantly insinuated by counsel—without any substantiation whatsoever. See Judge Pope's Note 7.

duct cited are not thought to have had a *substantial* tendency to inflame the jury." (Emphasis ours.)

The real question, therefore, is—can a verdict be permitted to stand which is found to be in *any* degree the result of appeals to passion and prejudice?

The question presented here is not one, as contended by Respondent, that affects merely the litigants in this case—it goes to the very heart of judicial administration. The majority opinion has laid down the test for determining whether or not a verdict is vitiated and a litigant deprived of a fair trial where a consistent and cumulative course of inflammatory conduct is involved that could not possibly be cured by any instruction of the trial court—that test is whether or not such appeals to passion and prejudice have a *substantial* tendency to inflame a jury.

It is submitted that this departure by the court below from the accepted and usual course of judicial proceedings is clearly a matter of public importance calling for a review by this court in the exercise of its power of supervision under Rule 38, 5(b).

The above test is directly in conflict with the test laid down by this court in the case of *Minneapolis, St. Paul, etc. v. Moquin* (1931), 283 U.S. 520, 75 L.Ed. 1243, 1244—in which this court said:

> "In actions under the Federal statute (Employers Liability)[2] no verdict can be permitted to stand which is found to be *in any degree* the result of appeals to passion and prejudice. Obviously such means may be

[2]The court pointed out that the determination was under a Federal statute because the case came up from a *state* court. There is no necessity of showing a Federal question was involved when the question is one of administration of justice in a *Federal* court.

quite as effective to beget a wholly wrong verdict as to produce an excessive one. *A litigant gaining a verdict thereby will not be permitted the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent.*" (Emphasis ours.)

The majority placed its result on a calculation and speculation which this Court has held is not to be indulged in.

Prior to the instant decision the law has been that conduct on the part of a litigant or his counsel which to *any* degree induces a verdict by appeals to passion and prejudice vitiates that verdict irrespective of whether or not it is measured or tested by the word "substantial". It clearly appears from the majority opinion that the majority *recognized* the existence of inflammatory appeals in stating "One need not approve tactics of this sort in order to reject appellant's argument." The affirmance of this case will be nothing less than an approval of such tactics. Furthermore, the majority of the panel did not make any specific finding that the verdict was not induced in *any* degree by passion and prejudice. It leaves uncontradicted the finding by Judge Pope in his dissent that it was so induced.

RECORD REFUTES "DETERMINATION BY MAJORITY OF NINTH CIRCUIT JUDGES"

At the bottom of page 9 of Respondent's brief in opposition, reference is made to the fact that the Court of Appeals for the Ninth Circuit not only affirmed the judgment in its initial opinion, but likewise denied the petition for rehearing en banc, and then Respondent states:

"Therefore, under 28 U.S.C.A. Section 46 at least a majority of all the judges of the Ninth Circuit have

determined that the judgment of the trial court was not in error."

There is no evidence in the record that the petition for rehearing en banc was ever submitted to any judges of the Ninth Circuit Court other than Judges Healy, Bone, and Pope.

On page 2226 the record is very clear that the proceedings were had only before Judges Healy, Bone and Pope, and the order entered states:

> "Upon consideration thereof, and by direction of the Court, It Is Ordered, by Circuit Judges *Healy* and *Bone,* that the petition of appellant, filed January 18, 1952, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied" (emphasis ours).

The petition for rehearing requested hearing *en banc.* As shown above, that petition was denied by the same two judges, Judges Healy and Bone, who joined in the majority opinion. Consequently—contrary to Respondent's contention—the determination by the Ninth Circuit was not by a majority of all the judges of that Circuit.

VERDICT WAS RESULT OF INFLAMMATORY APPEALS TO PASSION AND PREJUDICE

Respondent relies repeatedly on the action of the trial judge. But the trial judge misconceived his function and duty on a motion for new trial. We refer again to Judge Pope's opinion, Note 8. An analysis of the trial judge's opinion shows his clear recognition of a large verdict, his obvious omission to "weigh the evidence" as was his duty on a motion for new trial, the complete lack of reference

to and weighing of the vast amount of uncontradicted and unimpeached testimony referred to by Judge Pope in mitigation and justification, and his declared position that "a jury trial would be a useless thing if in the final outcome the court could supplant its opinion in the place of the opinion of the jury". The court's stated conception of his function would apply to his function on a motion for a directed verdict rather than to his duty on a motion for a new trial. See also his statement that "the Court should not substitute its judgment for the judgment of the jury, *even though the Court may be entirely dissatisfied with the jury's verdict.*"

At page 14 of his brief, Respondent argues that we have "ingeniously and gratuitously assumed" that the verdict was excessive and that it resulted from appeals to passion and prejudice—without support in the record for our position. We have made no such "assumptions".

Respondent does not deny and cannot deny the statement on page 8 of our petition that there was not a word of testimony which would support any finding of damage in fact. No actual damages were proved or attempted to be proved.

As to the charges of false imprisonment—despite the trial judge's erroneous finding "that the company placed armed guards around his apartment and kept them on the constant watch for three days, or the better part of three days, to prevent him from leaving", counsel for Respondent has finally been forced to admit that the alleged "imprisonment" could not have been for more than a few hours on Saturday afternoon of the week end (Respondent's brief, pages 5, 6). The record shows that this so-called imprisonment was during the time two County officials—not agents

or employees of petitioner—were in Respondent's apartment discussing the situation with Respondent. We submit that Judge Pope has accurately stated that "the evidence of imprisonment was exceedingly flimsy".

As to the claimed charges of slander, Respondent attempts to rivet attention on various alleged occurrences on the May week end by pulling a curtain down on the many months of background and setting of the whole case which was shown by an overwhelming amount of uncontradicted and unimpeached testimony—fully documented by Judge Pope. After a long course of conduct by Respondent in the company hospital—ranging from erratic and bizarre behavior to downright malpractice—Respondent was given a 60-day termination notice on April 30th—two weeks *before* the events of the May week end. The operation on a pregnant woman (resulting later in Respondent's admitted burial in the ground of the fetus) was not an isolated event but was the proximate cause of justifiable anxiety and action on the part of the mining company officials. The record shows Petitioner's officers honestly believed that there was "something wrong" with Respondent. In this connection, Judge Pope specifically finds "there was assuredly something gravely wrong about the conduct of the appellee doctor in and about the performance of his duties".

In view of what Judge Pope has characterized as "a thin case whipped up into a monstrosity", Respondent's counsel lean heavily upon charges of malice. The charges of malice referred to in Respondent's brief were controverted by the County Attorney, by Dr. Lowe, and others to whom the statements were attributed. We realize we must assume for the present purpose a permissible inference of malice, but

we submit that when the events of the week end are put into their proper focus, that the inference of *lack of malice* on the part of the officials responsible for the community—is the "stronger" inference, as stated by Judge Pope.

The overwhelming uncontradicted and unimpeached testimony in mitigation and justification has, as Judge Pope indicates, been overlooked.

Petitioner submits that the excessive verdict against the petitioner corporation (with the exoneration of the principal actor for the corporation—John D. Bradley) was directly due to the consistent inflammatory appeals to passion and prejudice. These appeals have not been "assumed" by Petitioner but are grounded on the record as set forth in the petition and in Appendix B thereto. We purposely quoted at length from Judge Pope's dissent in which these appeals are documented because we preferred to present the matter in the form of a judicial finding of a member of the court, rather than to be left open to a charge of biased advocacy on our part.

To avoid dealing with the crucial issue here, Respondent has obviously attempted to argue that the petition presents merely a case of a verdict based on conflicting testimony. The question of whether appeals to passion and prejudice have affected a jury verdict can arise *only* in situations where some conflict has occurred—otherwise a verdict would be directed as a matter of law. Questions as to passion and prejudice occur when inflammatory appeals *have poisoned the resolution of a claimed conflict in testimony* by the jury as in the instant case.

Respondent's citations do not sustain the decision below involving a finding by the dissent that the inflammatory

appeals affected the verdict and a recognition of such appeals by the majority.

We note, on page 10 of Respondent's brief, counsel's warning to this court as to the size of the record. So far as we know, this court—in its interest in the proper administration of justice in Federal courts—has not dodged a question which merited consideration because of the size of a record. We are not asking for "an additional hearing on the merits" as Respondent contends. The record as to the inflammatory appeals to passion and prejudice is set forth in detail in our petition and appendices plainly demonstrating that Petitioner did not have a fair and impartial trial of the disputed question as to its liability.

The effect of the majority panel ruling—a license permitting with impunity such inflammatory conduct in any trial—far transcends this case. We respectfully submit that this Court should issue its writ of certiorari, as prayed.

Dated: April 22, 1952.

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Supplement to Reply Brief of Petitioner

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner submits this supplement to its reply brief because of Respondent's assertion that a majority of the judges of the Ninth Circuit had participated in the determination below. It was not possible, at the time of filing our reply, to complete an analysis of the practice of the Court of Appeals for the Ninth Circuit in acting upon petitions for rehearing en banc.

On page 9 of Respondent's brief in opposition to our petition it is stated:

"The Court of Appeals for the Ninth Circuit not only affirmed the judgment in its initial opinion, but likewise denied the petition for rehearing en banc. Therefore under 28 U.S.C.A. Section 46 *at least a majority* of all of the

judges of the Ninth Circuit have determined that the judgment of the trial Court was not in error."

Respondent's misrepresentation on this point—based on this record—is pointed out in Petitioner's reply brief, pages 4 and 5. The record shows that only two judges, not a majority of seven, denied the petition for rehearing en banc—the same two judges, Judges Healy and Bone, who joined in the majority opinion. As a matter of fact the petition for rehearing en banc was not even presented to the full court (R. 2226).

The petition for rehearing in the Court below was entitled "Appellant's Petition for a Rehearing En Banc." The petition was addressed: "To: The Honorable, the Chief Judge, and to the Honorable, the Circuit Judges of the United States Court of Appeals for the Ninth Circuit." The petition expressly sets forth "grounds for rehearing en banc" and requested, throughout, action by the full court of 7 judges.

For convenience we again set forth the order which occurred at page 2226 of the record:

> "Upon consideration thereof, and by direction of the Court, It Is Ordered, by Circuit Judges *Healy* and *Bone,* that the petition of appellant, filed January 18, 1952, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied" (emphasis ours).

PRACTICE OF NINTH CIRCUIT AS TO ACTION ON PETITIONS FOR REHEARING EN BANC CONTRAVENES INTENT OF CONGRESS.

The practice of the Ninth Circuit is *not* to present petitions for a rehearing en banc to all seven judges for

determination. They are presented *only* to the minority *panel* of three judges who have acted on the case. Thus 3 out of 7 judges—and in numerous cases 2 out of 7 judges, as in the instant case, have denied petitions addressed to the full Ninth Circuit court.

We submit this practice—and the minority denial in this case—flies in the face of the intent of Congress enacted in 1948 in Title 28 U.S.C. Section 46(c), which provides:

> "(c) Cases in controversies shall be heard and determined by a Court or division of not more than three judges, *unless a hearing or rehearing before the Court en banc is ordered by a majority of the Circuit Judges of the Circuit who are in active service.* A Court en banc shall consist of all active circuit judges of the Circuit."

In denying the petition below for a rehearing en banc, 2 judges by their action—pursuant to Ninth Circuit Court practice of *not* presenting such petition to all 7 judges in the Circuit—short circuited any consideration of the petition by the majority of the Ninth Circuit judges.

How can the clear Congressional intent expressed in the above Judicial Code section possibly be carried out if a petition for rehearing en banc addressed to the full complement of 7 judges of a Circuit is by this Circuit's practice not even presented to all 7 judges for majority action—but is distributed and submitted for determination *only* to a *minority* panel of the three judges who acted on the appeal? Such practice and determination is directly in conflict with the above Judicial Code section and decisions of this Court. The Code section specifically provides for an order "for a hearing or rehearing en banc by a *majority* of the Circuit

judges of the circuit"—*not* by a majority of a *panel* or *division* of a Circuit. Obviously this practice of the Ninth Circuit—as demonstrated in the instant case—amounts to a nullification of Section 46(c).

HISTORY OF SECTION 46(c)—NINTH CIRCUIT PRACTICE

Title 28 U.S.C. Sec. 46(c) resulted from a conflict between the Ninth Circuit and the Third Circuit. In *Lang's Estate v. Commissioner*, 97 F.(2d) 867 (1938), the Ninth Circuit held that there was no basis in law for hearings or rehearings en banc. A contrary holding by the Third Circuit appeared in *Commissioner v. Textile Mills Corporation*, 117 F.2d 62 (1940). On Certiorari in the *Textile Mills* case, this Court upheld the Third Circuit. A bill (S. 1053)—introduced in the 77th Congress in an effort to amend Section 212 of old Title 28 U.S.C. to clarify the statute in accordance with this Court's holding—was not then enacted but was adopted in substance as Section 46(c) when the Judicial Code was revised in 1948.

According to the reviser's note this Section 46(c) "preserves the interpretation established by the Textile Mills case"—*Textile Mills v. Commissioner*, 314 U.S. 326, 333, 86 L.Ed. 249 (1941). Justice Douglas in delivering the opinion of this Court in the *Textile Mills* case in support of a Circuit Court decision rendered en banc refers to the history of old Title 28 U.S.C. and stated:

> "Certainly the result reached makes for more effective judicial administration. *Conflicts within a circuit will be avoided, finality of decision in the circuit courts of appeals will be promoted.* Those considerations are especially important in view of the fact that in our federal judicial system these courts are the courts of

last resort in the run of ordinary cases. Such considerations are, of course, not for us to weigh in case Congress has devised a system where the judges of a court are prohibited from sitting en banc. But where, as here, the case on the statute is not foreclosed, they aid in tipping the scales in favor of the more practicable interpretation."

In *U. S. ex rel. Robinson v. Johnston,* 316 U. S. 649, 86 L.Ed. 1732 (1941) this Court granted certiorari to the Court of Appeals for the Ninth Circuit—citing the *Textile Mills* case—and at the same time vacated the Ninth Circuit Court's judgment and remanded the case "for further proceedings, *including leave to petitioner to apply for a hearing before the Court en banc,*" stating:

"In view of the conflict of views which has arisen among the judges of the Ninth Circuit with respect to the decision in this case (see Robinson v. Johnston (C.C.A. 9th), 118 F.(2d) 998, 1001, and Crockett v. United States (C.C.A. 9th), 125 F.(2d) 547-549) and in view of this Court's decision in Waley v. Johnston, 316 U.S. 101, ante, 1302, 62 S.Ct. 964, reversing (C.C.A. 9th), 124 F.(2d) 587, the judgment is vacated, and the case is remanded to the Circuit Court of Appeals for further proceedings, including leave to petitioner to apply for a hearing before the court en banc. See Textile Mills Corp. v. Commissioner of Internal Revenue, 314 U.S. 326, ante 249, 62 S.Ct. 272."

Subsequent to the above decision of this Court in the Johnston case, the Ninth Circuit on its own motion ordered a hearing en banc and reversed its earlier decision—see *Robinson v. Johnston,* 130 F.2d 202 (1942).

Approximately seven years later a petition for a rehearing en banc was denied by 2 judges of the Ninth Circuit (out of a panel of 3) in the case of *Independence Lead Mines Co. v. Kingsbury,* 175 F.2d 983 (1949). Chief Judge C. Denman, dissenting, stated (page 992):

> "The attempt of two judges in a panel of three judges to deny a petition for rehearing en banc violates the law as established in United States ex rel. Robinson v. Johnston, 316 U.S. 649, 650, 62 S.Ct. 1301, 86 L. Ed. 1732, and Textile Mills Securities Corp. v. Commissioner, 314 U.S. 326, 333 et seq., 62 S.Ct. 272, 86 L. Ed. 249.
>
> The order of August 22, 1949, of this panel of this court does not truthfully describe its action. What it attempts to do is to deny a petition to the Court en banc for a rehearing by our whole court of seven judges. * * *
>
> *In view of the Supreme Court decisions cited above, it is too obvious to need argument that two judges cannot thus assume to act on a petition addressed to seven judges."* (Emphasis ours.)

This is exactly what happened in the instant case. Furthermore our petition addressed to all 7 judges and requesting specifically a rehearing en banc—based, among other things, upon the vigorous dissent of Judge Pope *was not presented* to the 7 judges but *only to* the 3 judges of the panel, Judges Healy, Bone and Pope (R. 2226). The order at page 2226 of the record, quoted above, shows that only Judges Healy and Bone acted in denying the petition for rehearing en banc below. It will be noted also, in line with Judge Denman's dissent in the *Independence Lead Mines* case that the order (R. 2226) by "the Court" referred to

above "does not truly describe its action." The order below is an "order denying petition for rehearing." No mention whatever is made of the fact that the petition—expressly addressed to all 7 judges—was a petition for *rehearing en banc.* The order also states that it is made "upon consideration thereof, *and by direction of the Court*"—despite the fact that the petition was presented only to 3 judges out of 7 and denied by 2 judges (R. 2226).

The practice in the Ninth Circuit of two judges denying a petition addressed to the full Court seems not to have been repeated after the Independence Lead Mines case until the denial of the petition for rehearing en banc by Judges Healy and Bone in this case. Instead in *Kronberg v. Hale,* 181 F.(2d) 767 (Feb. 1950) the Ninth Circuit (per curiam, before Judges Healy, Orr and McAllister) inaugurated the procedure of *striking* a petition for a rehearing en banc "as being without authority in law or in the rule or practice of the court."

In May, 1950 an identical order striking the petition was made in two cases, on the authority of the Kronberg case, by a panel consisting of Circuit Judge Bone and District Judges Goodman and Mathes—see *Freuhauf Trailer Co. v. Myers,* 181 F.2d 1008, and *Northwestern Mutual Life Insurance Company of Milwaukee v. Gilbert,* 182 F.2d 256.

On January 23, 1952, our petition for rehearing en banc addressed to the Chief Judge and all the Circuit Judges of the Court below was not "stricken" as in the *Kronberg, Freuhauf* and *Gilbert* cases—but was "denied" by two judges of the Ninth Circuit panel without any reference to the fact that the petition specifically requested a hearing en banc by the full court. Under the Ninth Circuit practice,

as we have pointed out, the petition for rehearing en banc was not even presented to the full court for consideration.

Seven days later on January 30, 1952, in *Western Pacific Railroad Corporation, et al., v. Western Pacific Railroad Company, et al.* (Circ. 9—No. 12,506) the prior procedure of striking a petition for rehearing en banc was resumed —the petition being stricken on the authority of the *Kronberg* case by Circuit Judge Healy and District Judge Byrne—District Judge Fee dissenting. There is now pending in the Court of Appeals for the Ninth Circuit a petition in the *Western Pacific* case "for leave to file a motion to vacate order striking appellant's petition for rehearing en banc and reinstating such petition."

It is significant that there is no provision in the rules of the Court of Appeals of the Ninth Circuit for a rehearing en banc. In this connection see the Final Report of the Committee on Codification and Revision of the Judicial Code, transmitted on August 16, 1948 to the Courts of Appeals by the Director of the Administrative Office of the United States Courts, which sets out the contents of Section 46(c) and states:

> "The new provisions will call for changes in the rules of each of the Circuit Courts of Appeal."

It is apparent, however, that the rules of the Ninth Circuit were not changed as a consequence of the new Judicial Code, except as to the name of the Court and the title of the Chief Judge. The history of Ninth Circuit determinations in connection with petitions for rehearings en banc shows the adopted practice of not presenting such petitions to the attention of the full court—at times even over the protest of the Chief Judge. It is clear therefore that a liti-

gant in the Ninth Circuit, as in the present case, is deprived of a proper consideration and determination of such petitions—contrary to the obvious intent of Section 46(c) which provides that such petitions may be ordered *by a majority of the Circuit Judges of the Circuit.* Under the Ninth Circuit practice 3 judges and often 2 judges, as in the case at bar, may prevent the majority of the 7 judges from even being aware of the request for relief which the statute empowers the majority of 5 judges to grant.

We respectfully submit that petitions addressed to the full court for a rehearing en banc should be entitled to such consideration that a denial of the petition results *only when a majority of the individual judges are unwilling to grant it.*

The practice of the Ninth Circuit has received adverse comment—see the discussion of the *Independence Lead Mines* case in 63 Harvard Law Review 1449.

PETITION FOR REHEARING EN BANC WAS PARTICULARLY APPROPRIATE IN THIS CASE

In our petition below, we pointed out—as a ground for rehearing by the full court—the divergence of views expressed by the various judges of the Ninth Circuit on matters involved in the decision. We respectfully submit, as we did in our rehearing petition, that the view of the 2 judges who affirmed the judgment does not represent the view of the majority of the 7 judges—and that Petitioner has been the victim, with deference, of the happenstance that a majority of the 3 judges who sat represented a view that is the view of only a *minority* of the full court.

We bottom this suggestion on the expressed views of the members of the court below. We believe that *Southern*

Pacific Co. v. Guthrie, 186 F.2d 926, decided by the full court on rehearing, demonstrates that the result in the instant case reflects a view which is not the view of the majority of the members of this court. The only point considered in the *Guthrie* case, on rehearing, was whether the damages awarded were so excessive that the Court should exercise its appellate power of correction. There was no claim, or ground for claim, that there was any appeal to, or that the verdict was the result of, passion or prejudice. Three members of the Ninth Circuit, Chief Judge Denman and Judges Stephens and Mathews, expressed the view which we urge should have directed the result in this case.

Three other judges of the Ninth Circuit, Judges Pope, Healy and Orr, joined in an opinion by Judge Pope clearly intimating (but not in terms deciding) that the Court had power to deal with excessive verdicts but holding that the case was not one in which the power should be exercised. The case was one of the loss of a leg by a railroad engineer, —it was one in which, on any view, there was substantial damage. The appellant in that case did not argue that there was no substantial damage. It was not a case where, concededly—as in this case—there was no real damage in fact. Still in this posture the deciding vote was cast by Judge Bone, who went upon the ground that the Court had *no power to consider the question* at all and, quite logically, if this was his view, said that the Ninth Circuit decision in *Cobb v. Lepisto,* 6 F.2d 128, should be overruled.

A little over a month later the court below, by Chief Judge Denman and Judges Stephens and Orr, decided *Covey Gas & Oil Co. v. Checketts,* 187 F.2d 561. The action was for damages for the death of a son. On no rational basis

can the very real damage suffered there be compared with this case which Judge Pope has characterized as "thin." The court, upon the ground of excessiveness of the award (no appeals to prejudice were involved), was unanimous in reversing for a new trial unless plaintiffs consented to a reduction of the award by approximately three-sevenths. This excess, of about 42 per cent, the Court said, was "gross, and we think that the adjective 'monstrous' as used by the Supreme Court is applicable to American justice if it compel a defendant to pay such a gross excess which it does not owe."[1]

The case is significant for Judge Orr's concurrence. It indicates that he agreed in principle with the minority in the *Guthrie* case, and joined the majority, in that case, only because of a difference of view as to the weight of the considerations involved in that particular case. And, as his dissent in this case shows, Judge Pope's view is the same.

With deference, we suggest that other decisions of the court below indicate that had the case at bar been submitted to the full court, Chief Judge Denman and Judges Stephens, Mathews and Orr could well have been of the view that the result is so shocking that a proper exercise of their function would call upon them to relieve the appellant from a plain injustice. Judge Pope has spoken in this case. But the judgment is, nevertheless, affirmed by Judge Healy writing an opinion dictated by views, we submit with deference, *not* harmonious with the views of the majority of the Court—concurred in by Judge Bone, who has expressed the view that the question presented should not be

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[1]The trial judge whose denial of a motion for new trial was reversed in the Checketts case is the judge who denied the motion for new trial in this case.

considered at all. These 2 judges alone denied the petition for a hearing en banc. The granting of that petition was urged below because of our conviction that there is a cleavage based upon divergent views of the function of judges of the Ninth Circuit.

As to this case itself we submit that it should not be permitted to stand as a precedent for what can be allowed for punitive damages or as an invitation to counsel to get such results by a planned and sustained campaign of flagrant misconduct to arouse the passions and prejudices of the jury by suggestions by counsel, unsustained by the evidence and without intention or attempt to sustain them, —by practices universally condemned.

If the opinion of the majority in this case, that is, 2 judges out of 7, is to be the rule in the Ninth Circuit—when, if ever, can it be said that a record contains a basis for a claim that any verdict was given under the influence of passion and prejudice in the light of the persistent course of conduct pursued by counsel for respondent in propounding inflammatory questions to petitioner's witnesses ostensibly for the purpose of impeachment but never followed through?

In the majority opinion—in reference to the impeaching questions not attempted to be followed up by evidence that the witness had not in fact made the statement—it is stated:

> "We think one need not approve tactics of this sort in order to reject appellant's argument."

The affirmance of this case will be nothing less than an approval of such tactics—inviting, as here, grossly excessive verdicts. If this statement stands, no attorney need have any inhibitions in the trial of a case and may inten-

tionally ask any question, under the guise of impeachment, placing in the record by inference, any evidence no matter how damning and inflammatory it may be; and instead of courts administering justice under the law, justice will be perverted and something else will be administered instead of justice.

It serves little to *say* the court does not approve where its *holding does approve* the result.

The 2-judge panel opinion will clearly reflect itself in the future if allowed to stand. It marks a sharp departure—a decision in conflict with judicial antecedents, and with certain prospect of progeny.

These fundamental issues we *attempted* to place before *all* of the Ninth Circuit judges. Contrary to Respondent's assertion—and contrary to the provisions of Judicial Code section 46(c)—our petition for a rehearing en banc was presented to and denied by a *minority* of the judges.

We respectfully submit that this Court should issue its writ of certiorari, as prayed.

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